

June 23. 1766.

A N S W E R S

F O R

Margaret Burnet, spouse to Alexander Bannerman
merchant in Aberdeen,

T O

The PETITION of Marjory Burnet, widow of
George Forbes junior, merchant in Aberdeen.

FROM the codicil which gives occasion to the present question, it appears clearly to have been at that time the will of Dr Burnet, the testator, that L. 1000 Sterl. should be divided betwixt the children of his sister Marjory Burnet, the petitioner, and the children of his niece Margaret Burnet, the respondent; of which sum the petitioner's children were to have L. 600, and the respondent's children L. 400; and the mothers were to liferent the portions of their respective children.

And if your Lordships could entertain any doubt of the defunct's will from the words, it could be very clearly proved from the evidence both of Mr Andrew Burnet, the executor, who wrote the codicil, and Mr Thom, at whose sight the money is directed to be settled, and of sundry other persons of character, to whom he declared his purpose long before the codicil was executed; for the execution was delayed, waiting for Mr Andrew Burnet the executor, until the day
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before the defunct's death. The only question, therefore, is, Whether this intention can be disappointed by the manner in which the testator has executed it, *viz.* by the false narrative, That in his will he had left to his niece Margaret Burnet, the respondent, the liferent of L. 200 Sterling, and to his sister Marjory the liferent only of L. 400 Sterling; whereas in fact he had left to his sister the liferent of the whole L. 600 given by his will, even of the L. 200 of which he had given the fee to the child of his niece Margaret Burnet; so that by his will he gave no liferent at all to his niece.

It is an agreed fact, that the testament was not then in the hands either of the testator or of Mr Andrew Burnet; and as it had been executed about nine years before, *viz.* in September 1754, it was natural enough that both the writer and the dying man should have forgot the precise contents of it, and should have supposed that the testator's plan at that time was also his plan when he made his will, *viz.* that each of the ladies should liferent the portion given to her children. But this mistake will not disappoint the plain will of the testator; for it is sufficient that his last will was, that the money should be liferented in the way mentioned in the codicil. And though a false narrative of a deed which a man cannot alter will signify nothing, where a man has it in his power to alter, or make a new settlement, the false narrative has the same effect as if it had been truly contained in the former deed. For example, suppose a man says in his codicil, "Whereas I have legated to John in my will L. 100, I give him now in my codicil L. 100 more," there can be no doubt but that John would be intitled to a legacy of L. 200, suppose his name had never been mentioned in the will; because the intention of the testator is clear, that John should have L. 200; and whether he gave it him then or formerly, is the very same thing. In the same manner, if the testator in his codicil should say, "Whereas I gave to John in my testament L. 400, I now give him an addition of
" L. 200

"L. 200 more;" and suppose it should be found in the testament, that John had got L. 600, he would nevertheless get no more than fix, for the reason mentioned in the Lord Ordinary's interlocutor, namely, that he got the additional two only upon the supposition that he had got no more than L. 400 before. And this last case is exactly similar to the present, with this only difference, that it was more natural that the testator here should be led into a mistake in the recital of his will, by the confusion that the distribution of the fee and liferent betwixt the ladies and their children occasioned.

In all such cases the law presumes, that if the testator had been set right, and informed of his mistake, he would have said, "Very well; if I did not do it then, I can do it now; so let it be done." And indeed there can be no doubt but that Dr Burnet would have said so in this case, when it is considered how much more rational his last will is than his first; as by his last he clears and separates the interests of the ladies and their children from one another, making each of the ladies liferent the portion given to her children; whereas by the former will one of them liferented the whole portion given to the children of the other. And by this last will, according to the interpretation put upon it by Marjory, their interests are so confused and jumbled together, that she liferents L. 200 of what is given to Margaret's children.

The argument in the petition goes upon the supposition, as if Dr Burnet had revoked in his codicil what he had done in favour of the petitioner in his testament. If it were so, the respondent has no doubt but that a testator, by such a narrative in his codicil, could revoke and take away, as well as give. But the fact is, that the testator here has taken away nothing from his sister or her children, of what he had given them in his testament; for the sister by the codicil still retains the liferent of L. 600, and her children get an

an additional legacy of L. 200: And the only question is, whether or not the sister is to have the additional liferent of L. 200, given her by the codicil? as it is said in the Lord Ordinary's interlocutor, the testator's will is in the codicil only to add to her the liferent of L. 200, on the supposal that she was formerly provided to no more than the liferent of L. 400. And this reason would be decisive of the case, even if it were a deed *inter vivos*; much more is it so in the case of a testament or codicil, where the will any way expressed is sufficient.

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As to the authorities from the Roman law, to prove that a *falsa demonstratio*, or a *falsa causa, non nocet legato*, they appear to prove against the petitioner; for they shew that the will of the testator, however expressed, or whatever reason may be given for it, ought to be the rule. And if a false demonstration, or a false cause, will not hurt a legacy, neither ought a false narrative, such as is here. And accordingly the petition admits, "That an error in the narrative upon which a legacy proceeds, does not invalidate the legacy itself." And therefore, as in this case, the will of the testator is clear, that the liferent of L. 1000 Sterling should be divided betwixt the sister and niece, in such a manner, that the sister should liferent L. 600 of it, and the niece L. 400; the false narrative upon which this destination proceeds cannot invalidate it.

In respect whereof, &c.

JA. BURNETT.

